

Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-445

JOHN KENNY and ROBERT KENNY,
Executors of the Estate of
JOHN J. KENNY, Decd.,
Petitioners,

v.

LOUIS SANFILIPPO, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT AND APPENDIX

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO.

JOHN KENNY and ROBERT KENNY,
Executors of the Estate of
JOHN J. KENNY, Decd.,

Petitioners,

v.

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN HOWARD,
UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON
FLAGG, FRANK BLANDI, W. B. SETTLE, LEO WHITE,
DANIEL DUBANIEWICZ, ADOLPH DONADEO, H. J.
GUEMRICH and FRANCIS KEENAN, All as Trustees
ad litem of THE WESTERN PENNSYLVANIA HOTEL,
CLUB, MOTEL, AND RESTAURANT EMPLOYEES PENSION
FUND, and/or SUCCESSOR TO TRUSTEES OF THE HOTEL
AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION
237 INSURANCE AND WELFARE TRUST FUND AND
TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES
ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

Petition for Writ

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN HOWARD,
UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON
FLAGG, FRANK BLANDI, W. B. SETTLE, LEO WHITE,
DANIEL DUBANIEWICZ, NICHOLAS ALWINE, H. J.
HUEMRICH and FRANCES KEENAN, all as Trustees ad
litem of THE WESTERN PENNSYLVANIA HOTEL, CLUB,
MOTEL and RESTAURANT EMPLOYEES WELFARE FUND,
and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND
RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237
INSURANCE AND WELFARE TRUST FUND AND TRUSTEES OF
THE HOTEL AND RESTAURANT EMPLOYEES, ALLIANCE
LOCAL UNION 237 PENSION TRUST FUND,

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS
INTERNATIONAL UNION WELFARE FUND and WILLIAM L.
MEYERS, Individually and trading as WILLIAM L.
MEYERS COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

To The Honorable, the Chief Justice of the
United States and the Associate Justices of
the Supreme Court of the United States:

Petition for Writ

The petitioners, John Kenny and Robert
Kenny, Executors of the Estate of John J. Kenny,
Decd., respectfully pray that a writ of
certiorari issue in the above captioned case
directed to the United States Court of Appeals
for the Third Circuit to review its Judgment
(App.1) in so far as it affirms the District
Court's failure to award to the plaintiff damages
for the full unexpired term of his breached em-
ployment contract in Appeal No. 76-2475 dated
and entered June 23, 1977.

Opinions Below

The opinion of the United States District
Court for the Western District of Pennsylvania
at Civil Action No. 75-40 has not been reported.
A copy thereof and Judgment thereon are appended
hereto (App. 33). The Judgment of the United
States Court of Appeals for the Third Circuit
was not accompanied by an opinion, but affirms
on the Opinion and Judgment of the District
Court. A copy of the Judgment is appended here-
to at (App. 30).

Jurisdiction

Jurisdiction of this Honorable Court is invoked pursuant to the Act of June 25, 1940, c. 646, 62 Stat. 928, Title 28 U.S.C. Sec. 1254(1); Supreme Court Rule 19(1)(b); and this Honorable Court's power of supervision over Courts of Appeal and District Courts. The Judgment sought to be reviewed was dated and entered June 23, 1977. The Opinion and Judgment of the District Court (App. 33) were dated and entered on August 2, 1976. The last day for presentation of the within Petition is September 21, 1977.

Questions Presented for Review

1. In an action for damages for totally unwarranted breach of plaintiff's written employment contract, tried without jury, where the District Court found that the contract was valid, clear and unambiguous, and that the "unilateral rescission" thereof and the discontinuance of plaintiff's salary thereunder were without cause, and no asserted affirmative

Questions Presented for Review

defense proven, may the District Court deny plaintiff damages for the renewal term thereof, the option for which was plainly exercised of record without contradiction or contest?

2. May a District Court, without any stated reason therefor, disregard the unquestioned and uncontradicted record exercise by plaintiff of his undenied right to renew his employment contract for a second five-year term, and disallow damages for such future period upon a completely unsupported conclusion "that it is not probable that Mr. Kenny would have exercised his option to renew the contract.." in view of his age (74 years) and his history of a heart "attack" 5 years before judgment and 2 years before assuming employment under the contract?

3. May a District Court deny plaintiff damages for the second five-year term of his valid employment contract found to have been unwarrantedly unilaterally breached, contrary to the historic holdings of this Honorable Court as well as of the decisions of the Court of

Questions Presented for Review

Appeals, the decisions of the Supreme Court of Pennsylvania, and the established principles of the law of damages?

4. Where a Court of Appeals, by affirmation of the Opinion and Judgment of the District Court which is clearly erroneous and based on plain error of record, sanctions departure by the District Court from the accepted and usual course of judicial proceedings and denies damages for unwarranted unilateral breach of an employment contract's renewed five year term, contrary to the holdings of this Honorable Court and of established policy and principles of law, effectively depriving the plaintiff of his property in the contract without compensation, should not this Honorable Court exercise its supervisory power to review and reverse that portion of the Judgment below denying plaintiff damages for the second five year term in accordance with the terms of the contract and remand with directions for allowance thereof?

Constitutional Provisions Involved

Art. 1, sec. 10, cl. 1, Contract Clause
Fifth Amendment...providing against deprivation of property without due process of law.

Fourteenth Amendment, providing against deprivation of property without due process of law and guaranteeing equal protection of the law.

Statement of the Case

The original action in the within litigation was brought in early December, 1974, in the Court of Common Pleas of Allegheny County, Pennsylvania. Plaintiff was the Director of local union employer-employee pension and welfare funds under written contract of employment, beginning May 1, 1973. He continued in office and received his contract salary until August 31, 1974, when, without any stated oral or written reason for so doing, salary payments were discontinued. At Civil Action No. 75-0040 in the United States District Court for the

Statement of the Case

Western District of Pennsylvania, defendants-respondents caused the action to be removed from the State court pursuant to 28 U.S.C. 1441 asserting jurisdiction under Section 502 (e) (1) of the Retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq, effective December 31, 1974, which states:

"....the District Courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the secretary or by a participant, beneficiary or fiduciary" against such pension or welfare trust funds.

After amendments of the complaint and answers, a non-jury trial was held before the Chief District Judge, and, on August 3, 1976, his Findings, Conclusions and Judgment were filed and served.

On August 26, 1976, defendants-respondents filed their notice of appeal; and on August 30, 1976, the cross-appeal was filed by plaintiff. Both of said appeals were from the final judgment of the District Court in accordance with

Statement of the Case

28 U.S.C. 1291; the plaintiff's appeal being limited to damages.

The United States Court of Appeals for the Third Circuit entered a Judgment affirming on the Opinion and Judgment of the District Court on June 23, 1977.

At the time of filing the original action in the Allegheny County Common Pleas the Complaint made reference to the employment contract attached as an exhibit thereto, wherein authorization for such contract was based upon employer-employee pension and welfare trust declarations. Federal jurisdiction warranting removal pursuant to 28 U.S.C. 1441 actually arose under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185, which states:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter or may be brought in any District Court of the United States...."

When the Retirement Income Security Act of 1974 became effective on December 31, 1974,

Statement of the Case

federal jurisdiction became exclusive, as aforestated.

The United States Court of Appeals raised a question and required briefing on federal jurisdiction; and, after argument, limited to such question, held that federal jurisdiction existed by reason of: *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 700 and *Riggs v. Island Creek Coal Co.*, 542 Fed. 334, 343 (Cir. 6).

Although the original complaint was twice amended after removal by leave of the District Court, and such amendments added new causes of action and new parties raising issues clearly within the purview of the provisions of ERISA, such issues were barred by ruling of the trial Judge in holding that since counsel for respondents agreed that the International Funds would be treated as constructive trustees below, the sole issues for trial were the validity of the contract ab initio and whether any ground existed for breach or rescission therefor.

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The District Court found: "The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. 1001 et seq. Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract." In these findings the District Court is amply supported by the record.

In awarding damages for the unwarranted breach, the learned District Court limited plaintiff's loss to the unexpired portion of the first five years of the contract, concludingly "that it is not probable that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term." In the latter conclusion, the District Court was plainly in error, in view of the unquestioned record exercise of plaintiff's option.

Statement of the Case

The plain error of the District Court was raised on appeal to the United States Court of Appeals for the Third Circuit, without relief.

Reasons Relied on for Allowance of the Writ of Certiorari

I. The Judgment of the Court of Appeals affirming the District Court's plain error in failing to award damages for the entire ten-year term of the plaintiff's breached employment contract is in conflict with applicable decisions of this Honorable Court

One of the oldest and soundest principles in our law recognizes the obligation of contracts; Art. 1 sec. 10, cl. 1, U.S. Constitution; by which "obligation" is meant the legally binding power requiring the parties to adhere to an agreement which at the time of contracting the law recognizes as legally enforceable; *Carder Realty Corp. v. State*, 23 N.Y.S. 2d 395; 260 App. Div. 459; *affd.* 285 N.Y. 803; *Holland v. General Motors Corp.*, 75 F. Supp. 274; *affd.* 169 F2d 254; *cert. den.* 335 U.S. 887.

Reasons Relied on for Allowance of the Writ for Certiorari

Even the provisions of the contract setting out conditions for its termination must be followed; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543.

Where, as here, the contract has been wrongfully breached and unilaterally rescinded contrary to the express provision set out in paragraph 1 thereof that the plaintiff as Director "shall not be subject to discharge or removal for said period of time (ten years) unless by mutual agreement of the said John J. Kenny and the majority of the trustees", the breach constitutes such repudiation of defendants' obligations thereunder as to entitle plaintiff to full damages for the entire period of the contract, both past and prospective, under the time-honored principle established in the Pennsylvania State and Federal Courts; *Russell v Barnes Foundation*, 52 F. Supp. 827 (E.D.Pa.) 1943; *affd.* 143 F2d 871 (Cir. 3); *cert. den.* 323 U.S. 771; 65 S. Ct. 122.

Ressons Relied on for Allowance of the Writ
for Certiorari

In 1859 this Honorable Court, in the case of Benjamin v. Hillard, 23 How. 149, 167, considered and "reaffirmed" the "rule" "that the amount that would have been received, if the contract had been kept, is the measure of damages if the contract is broken." "This rule", added the Court, "was reaffirmed in Hadley v. Baxendale, 10 Exch. 341." The "rule" was honored in United States v. Behan, 110 U.S. 338 and in Hinckley v. Bessemer Steel Co. 121 U.S. 264.

Forty years following Benjamin, in the classic decision which has been followed to this day, this Honorable Court in Pierce v. Tennessee Coal & Railroad Co., 173 U.S.1, observed that the "rule" had been widely accepted and was being firmly written into the law of contracts, noting:

"But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been toward allowing entire damages to be recovered, once for all, in a single action.....This especially appears by well considered opinions in cases of agreementsto pay wages...."

Reasons Relied on for Allowance of the Writ
of Certiorari

The learned District Court cited a reference to the Pierce decision in the Third Circuit Court of Appeals decision of Russell v Barnes Foundation, 52 F. Supp. 827, 830; but the quotation from Barnes in the lower Court's decision takes something away from the holding in Pierce. Moreover, in later decisions handed down in this Honorable Court, the "rule" has been consistently reaffirmed that where the contract spells out specifically the monetary obligations of the obligor, such obligations become the damages chargeable in case of unlawful rescission, breach or repudiation of the contract before completion of the employee's services thereunder; New York Life Insurance Co. v. Viglas, 297 U.S. 672.

The salary to be paid plaintiff below for the second five-year term was clearly spelled out in the contract, just as clearly, in fact, as it was for the first five years; but the learned trial Judge, determined to

Reasons Relied on for Allowance of the Writ
of Certiorari

disallow the damages for the second five-year term, "concluded" that "it is not probable that Mr. Kenny would have exercised his option to renew the contract", overlooking the undisputed fact that such option had indeed been exercised on the record at the very start of the case, in paragraph 8 of the Complaint which averred:

"8. Plaintiff has demanded payment from the Defendants of the sum of \$262,209, being the sum owing under the terms of the contract and the option of Plaintiff to renew same, which renewal option is hereby exercised by Plaintiff....."

Throughout the entire pleadings below the claim of the plaintiff was without context or question recognized as having been asserted on the full ten-year term--except in the erroneous "conclusion" of the trial Judge.

II. The Judgment of the Court of Appeals affirming the District Court's unwarranted failure to award damages for the unexpired full term of the plaintiff's breached employment contract conflicts with decisions of its own and of other Courts of Appeals

Reasons Relied on for Allowance of the Writ
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Cited by the District Court as basis for the "full" award for the first five-year term of the employment contract, is the leading case of Russell v. Barnes Foundation, 52 F. Supp. 827 (E.D. Pa.) 1943, affd. 143 F2d 871 (Cir. 3); cert. den. 323 U.S. 771, 65 S.Ct. 122. Professor Bertrand Russell, then aged 71 years, was a leading writer in the fields of philosophy, mathematics and social sciences, and was, seven years later, in 1950, to become the winner of a Nobel Prize in Literature; yet, though his ongoing earnings were far greater than his salary as a professor under contract to the Barnes Foundation, he was awarded the full past and future amounts called for therein, without credit for his other remunerative sources of income. The "rule" was followed and affirmed, as it had been in Ring v The Dimitrios Chandris, 43 F. Supp. 829; affd. 133 F2d 124 (Cir. 3).

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The United States Court of Appeals, in Lloyd v. Grinberg, 464 F2d 622 (Cir. 10) likewise followed the historic "rule", as did the District of Columbia Court of Appeals in Wright v. Disabled American Veterans, 271 F2d 827.

Were it not for the erroneous "conclusion" contrary to the unquestioned, record fact of plaintiff's exercise of his option to renew his contract, the rule would likely have been respected herein as well.

III. The Judgment of the Court of Appeals affirming the District Court's unwarranted failure to award damages for the full unexpired term of the plaintiff's breached employment contract conflicts with decisions of the Supreme Court of Pennsylvania

The employment contract here involved was drawn and entered into in Pittsburgh, Pennsylvania, where it was also breached. Significantly, the contract in Benjamin v. Hillard, 23 How. 149, 64 U.S. 149, was entered into in Wilkes-Barre, Pennsylvania.

Reasons Relied on for Allowance of the Writ
of Certiorari

The Pennsylvania courts have been following the rule made so clear in Benjamin without exception; Weinglass v. Gibson, 304 Pa. 203; Douglas v. Hustead, 216 Pa. 292; Weaver v. Maryland Casualty Co., 295 Pa. 486; Coates v. Allegheny Steel Co., 234 Pa. 199; Horvat v. Jenkins School District, 337 Pa. 193.

While the stated "law of the case" in this within matter appears to honor the "rule", it is in fact frustrated by the clearly erroneous "conclusion" of the District Court as to the "unexercised" option to renew.

IV. The Judgment of the Court of Appeals affirming the erroneous denial of damages for the second half of plaintiff's breached employment contract conflicts with the established and applicable principles in the law of damages, discriminatorily denying plaintiff below equal protection of the law

Obviously the five year term of plaintiff's employment contract for which no compensation was awarded below is a substantial property amounting to over \$150,000.00. The

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Constitution, in Art. I sec. 10(1) prohibits Congress and the States from passing any law "impairing the obligation of contract".

The Fourteenth Admendment, enjoining legislative action that would take a person's "life, liberty or property without due process of law" also prohibits adoption of laws that would "deny to any person within its jurisdiction the equal protection of the laws".

The Fifth Admendment is broader than the Fourteenth and broader even than Art. I sec. 10 (1) in that it simple declares: ".....nor shall any person.....be deprived of life, liberty or porperty, without due process of law". The Fifth Amendment addresses itself not only to the Legislative bodies, but to all who administer law, including our Courts.

Due process assuredly does not allude to the mere appearance of conformity with justice; and where, as here, a District Court has totally ignored the plain, admitted and uncontested fact of record that the plaintiff exercised his option which renewed his

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of Certiorari

contract for an additional five-year term, a judicial "conclusion" that "it is not probable" that he "would have exercised his option to renew" as a means of justifying denial of damages therefor is a patent denial of due process and an evasion of the established principles and rules of law; 6 Williston, Contracts, sec. 1344; Restatement, Conflict of Laws, sec. 372.

V. The Judgment of the Court of Appeals sanctions departure by the District Court from the accepted and usual course of judicial proceedings so as to call for exercise of this Honorable Court's power for supervision relative to disregard of uncontradicted record proof of exercise of the contract option to renew so as to avoid award of damages for the full term of the unexpired, breached contract

"It is well settled that meaning and effect should be given if possible to every part of a contract, and that a construction which neutralizes any provision of a contract should never be adopted if the contract

Reasons Relied on for Allowance of the Writ
of Certiorari

can be construed so as to give effect to all the provisions"; RESTATEMENT OF CONTRACTS, sec. 236 (1932); 13 APPLEMAN, INSURANCE LAW AND PRACTICE, sec. 7383 (1976); Looney v. Great American Ins. Co., 71 F.R.D. 211 (1976).

It is respectfully submitted that the learned Chief District Judge disregarded the record fact that the plaintiff had "exercised his option to renew the contract for an additional five year term", as evidenced in his Complaint, the Petition for Removal, the Answer, the Amended Answer, Plaintiff's Reply to the Counterclaim and the Amended Complaint, without objection, contradiction or dispute. Plaintiff's right to exercise his renewal option was at no time questioned by the defendants in the pleadings or upon trial. The option clause was clear, unambiguous and specific; nor was it construed to be otherwise by the learned Trial Judge. Nevertheless, despite its substantial value to plaintiff, the Court simply "neutralized" the option by disregarding the plaintiff's exercise

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thereof on the record, and discounting the "probability" that plaintiff "would have exercised" same, upon assumed, and unproved present or future incapacity to carry out his contract duties. Such disregard for the value of the option clause (exercised) in the contract, is most respectfully urged, is clearly erroneous.

Reference by footnote to plaintiff's present age 74, and his heart attacks in 1971 by the learned Trial Judge as justification for the presumption that he would probably not exercise his renewal option, moreover, disregards the record proof that he did not begin his contract term as director of the trust funds until May 1, 1973; and that he would have continued to carry out his duties except for the illegal and unwarranted breach and rescission as of August 31, 1974. No evidence whatever supports the finding by implication that although the plaintiff was able to carry out his duties while permitted

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so to do, his physical condition did or could be expected to worsen so as to limit his future ability so to do.

It is respectfully submitted that in the circumstances, the "plain error" in the District Court should be noticed herein pursuant to Rule 103(d) of the Federal Rules of Evidence; and especially since the error results in substantial deprivation of anticipated salary for the second and renewed five year contract term to April 30, 1983, it is prejudicial to plaintiff below; and even though not brought to the attention of the District Court, requires exercise of the plenary powers of this Honorable Court; *Sykes v. U.S.*, 373 F2d 607 (Cir. 5); cert. den. 386 U.S. 977; *Herzog v. U.S.* 226 F2d 561 (Cir. 9); 235 F2d 664; cert. den. 352 U.S. 844; *U.S. ex rel. Paxon v. Rundle*, 491 F2d 447 (Cir. 3), 1974; especially since the District Court's unsupportable inference is drawn not from testimony, but from documents

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or undisputed facts, does the clearly erroneous rule here apply; *U.S. v. State of Florida*, 482 F2d 205 (Cir. 5) 1973; *Engine Specialties, Inc. v. Bombardier Ltd.*, 454 F2d 527 (Cir. 1) 1972; and review of the whole record will support the contention of plaintiff that the learned District Court was clearly erroneous and mistaken both in its inference and conclusion that plaintiff had not yet exercised his option to renew the contract, and that by reason of his age and health that he would probably not do so, requiring correction herein; *O'Neill v U.S.*, 450 F2d 1012 (Cir. 3) 1971; and since the contract, including the option clause, was found to be valid, it is respectfully submitted that this Honorable Court's powers of review are not limited by the clearly erroneous rule; *Elmor, Inc., v. Cyprus Mines Corp.*, 467 F2d 770 (Cir. 3) 1972.

It is "Hornbook" law that as a federal District Court must ascertain and follow the view of a majority opinion and judgment

Reasons Relied on for Allowance of the Writ
of Certiorari

of the United States Court of Appeals in whose Circuit the District Court sits, where such view does not conflict with decisions of the United States Supreme Court; U.S. v. Killough, 218 F. Supp. 339, revd. 336 F2d 929; U.S. v. Guest, 246 F. Supp. 475, revd. 383 U.S. 745; so a Court of Appeals must follow the last views expressed by a majority decision of the Supreme Court; Marchese v. U.S., 378 F2d16, cert. den. 389 U.S. 930, 88 S.Ct. 294; reh, den. 389 U.S. 1025, 88 S.Ct. 585; U.S. v. Vida, 370 F2d 759, cert. den. 387 U.S. 910, 87 S.Ct. 1695, Kibby v. U.S., 372 F2d 598, cert. den. 387 U.S. 931, 87 S. Ct. 2055; Ferina v. U.S. 340 F2d 837, cert. den. 381 U.S. 902, 85 S.Ct. 1446; Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281; U.S. Gypsum Co. v. United Steelworkers of Am., 384 F2d 38, cert. den. 389 U.S. 1042, 88 S.Ct. 783; Cross v. Bruning, 413 F2d 678, cert. den. 396 U.S. 970, 90 S.Ct. 455, reh. den. 396 U.S. 1063, 90 S. Ct. 760.

Reasons Relied on for Allowance of the Writ
of Certiorari

Even where a lower court feels that any Supreme Court decision or rationale may result in a "seeming inequity" in a specific case, it is nevertheless bound by such decision and rationale; Duncan v. Carter, 289 F2d 179, cert. den. 370 U.S. 952, 82 S.Ct. 1602; McCray v. Burrell, 516 F2d 359, cert. granted, 423 U.S. 923, 96 S.Ct. 264; Ashe v. Swenson, 399 F2d 40, revd. 397 U.S. 436, 90 S.Ct. 1189.

It is most respectfully submitted that the lower courts failed to follow the rules and principles set forth in the clear mandate of the long line of decisions herein; and that the unsupported "conclusion" of the District Court was in effect an evasion thereof, so as to warrant exercise of the supervisory power reposed in this Honorable Court to reinforce Rule 103(d) of the Federal Rules of Evidence, and to prevent manifest injustice by departure from the accepted and usual course of judicial proceedings.

Conclusion

In view of the amply supported Findings and Conclusions of the learned Chief District Judge, who tried the case without jury, that the defendants failed to establish any cause for the unilateral rescission of the valid employment contract, it is respectfully submitted that the monetary award of damages should have included the entire ten year term, especially since the plaintiff has in fact exercised his option to renew for the second five year period, contrary to the District Court's erroneous implication that he had not done so and that his age and health would "probably" prevent him from so doing, which latter finding was not supported by evidence. Accordingly, it is respectfully submitted that the plaintiff is entitled to a total judgment in the sum of \$278,773.65, being the salary which plaintiff would have earned from September, 1974 to April 30, 1983, in addition to \$16,500.00 severance pay set by the contract; plus the costs of the within case.

Conclusion

WHEREFORE it is respectfully prayed that this Honorable Court issue a Writ of Certiorari in the within case directed to the United States Court of Appeals for the Third Circuit, to review its Judgment, and that to the extent that it affirms the denial of compensation for the second five year term of the employment contract of the plaintiff below, to reverse same, and to remand with directions that such award be added to that for the unexpired first five year term of the breached employment contract, together with the costs of these proceedings.

Respectfully submitted,

HARRY ALAN SHERMAN
Attorney for petitioner

1709 Blvd. of the Allies
Pittsburgh, Pa. 15219
412/471-7777

Appendix

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

NOS. 76-2475 and 76-2476

JOHN J. KENNY,

Appellant in No. 76-2475

v.

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN HOWARD,
UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON
FLAGG, FRANK BLANDI, W. B. SETTLE, LEO WHITE,
DANIEL DUBANEWICZ, ADOLPH DONADEO, H. J.
HUMERICK AND FRANCIS KEENAN, All as Trustees
ad litem of the WESTERN PENNSYLVANIA HOTEL,
CLUB, MOTEL AND RESTAURANT EMPLOYEES PENSION
FUND, (and/or SUCCESSOR TO TRUSTEES OF THE
HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL
UNION 237 INSURANCE AND WELFARE TRUST FUND
AND TRUSTEES OF THE HOTEL AND RESTAURANT
EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION
TRUST FUND),

AND

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDIANI, NORMAN HOWARD,
UMBERTO GUIDOTTO, ARTHUR TATANGELO, GORDON
FLASS, FRANK BLANDI, W. B. SETTLE, LEO WHITE,
DANIEL DUBANEWICZ, NICHOLAS ALWINE, H. J.
HUMERICK and FRANCIS KEENAN, all as Trustees
ad litem of THE WESTERN PENNSYLVANIA HOTEL,
CLUB MOTEL AND RESTAURANT EMPLOYEES WELFARE
FUND, (and/or SUCCESSOR TO TRUSTEES OF THE

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HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL
UNION 237 INSURANCE AND WELFARE TRUST FUND AND
TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES
ALLIANCE LOCAL UNION 237 PENSION TRUST FUND),

AND

HOTEL & RESTAURANT EMPLOYEES & BARTENDERS
INTERNATIONAL UNION WELFARE FUND & WILLIAM
L. MEYERS

AND

INTERNATIONAL UNION PENSION FUND
Louis Sanfillippo, et al., Appellants in
No. 76-2476

On Appeal from the United States District Court
for the Western District of Pennsylvania
Civil No. 75-40

Argued June 14, 1977

Before: ADAMS, VAN DUSEN AND GIBBONS, Circuit
Judges.

JUDGMENT ORDER

After consideration of the contentions
raised by appellant,¹ it is

Appendix

ADJUDGED AND ORDERED that the judgment
of the district court be and is hereby
affirmed.

Each side to bear its own costs.

BY THE COURT,

Circuit Judge

ATTEST:

Thomas F. Quinn
Clerk

Dated:

Certified as a true copy and issued in lieu
of a formal mandate on July 15, 1977

Test:

Clerk, United States Court of Appeals
for the Third Circuit

1. A question regarding jurisdiction over the
cause of action was raised in this Court.
It would appear, however, that the district
court had jurisdiction at the time it en-
tered judgment. See, e.g., Grubbs v. General
Electric Credit Corp., 405 U.S. 699, 700
(1972); Riggs v. Island Creek Coal Co., 542
F.2d 339, 343 (6th Cir. 1967).

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN J. KENNY,

PLAINTIFF,

v.

LOUSI SANFILIPPO, FRANK PRINCE,)
ROBERT NERN, RENALD ROSSA,)
JOSEPH CICARDINI, NORMAN HOWARD,)
UMBERTO GUIDOTTI, ARTHUR TAT-)
ANGELO, GORDON FLASS, FRANK)
BLANDI, W.B. SETTLE, LEO WHITE,)
DANIEL DUBANIEWICZ, ADOLPH)
DONADEO, H.J. HUENRICH and)
FRANCIS KEENAN, all as Trustees)
and litem of THE WESTERN PENNSYL-)
VANIA HOTEL, CLUB, MOTEL AND)
RESTAURANT EMPLOYEES PENSION)
FUND, and/or SUCCESSOR TO)
TRUSTEES OF THE HOTEL AND RESTAU-)
RANT EMPLOYEES ALLIANCE LOCAL)
UNION 237 INSURANCE AND WELFARE)
TRUST FUND TRUSTEES OF THE HOTEL)
AND RESTAURANT EMPLOYEES ALLIANCE)
LOCAL UNION 237 PENSION TRUST)
FUND,)

Civil Action

No. 75-40

and

LOUIS SANFILIPPO, FRANK PRINCE,)
ROBERT KERN, RENALD ROSS,)
JOSEPH CICARDINI, NORMAN HOWARD,)
UMBERTO GUIDOTTI, ARTHUR TAT-)
ANGELO, GORDON FLAGG, FRANK)
BLANDI, W.B. STEELE, LEO WHITE,)

Appendix

DANIEL DUBANIEWICZ, NICHOLAS
ALWINE, H. J. HUEMRICH and
FRANCIS KEENAN, all as Trustees
ad Litem of the WESTERN PENNSYL-
VANIA HOTEL, CLUB, MOTEL AND
RESTAURANT EMPLOYEES WELFARE FUND,
and/or SUCCESSOR TO TRUSTEES OF
THE HOTEL AND RESTAURANT EMPLOYEES
ALLIANCE LOCAL UNION 237 INSURANCE
AND WELFARE TRUST FUND AND TRUSTEES
OF THE HOTEL AND RESTAURANT EMPLOYEES
ALLIANCE LOCAL UNION 237 PENSION
TRUST FUND,

and

HOTEL AND RESTAURANT EMPLOYEES AND
BARTENDERS INTERNATIONAL UNION
WELFARE FUND.

and

INTERNATIONAL UNION PENSION FUND,

Defendants.

The above entitled action, tried to this court without a jury, was commenced by the plaintiff, John J. Kenny, in the court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, to recover damages for the wrongful termination by the defendants of his employment as Chairman of the Board of Trustees and Director of the

Appendix

Hotel and Restaurant Employees Alliance Local Union 237 Pension Trust Fund and Welfare Trust Fund (Local 237 Trust Funds), which funds were accumulated largely through the efforts of Mr. Kenny as President of Local 237.

The defendants, trustees of the Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Pension Fund and Welfare Fund (Western Pennsylvania Trust Funds) and the Hotel and Restaurant Employees and Bartenders International Union Pension Fund and Welfare Fund (International Trust Funds), removed the action to this court pursuant to 28 U.S.C.A. § 1441 (a)¹

¹28 U.S.C.A. #1441 (a) provides:

" . . . any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Appendix

and 29 U.S.C.A. #1001 et seq.,² applicable to employee welfare and pension benefit plans, and asserted a counterclaim for compensation paid to the plaintiff between May 1, 1973 and August 31, 1974.

FINDINGS OF FACT

From the inception of the Local 237 Trust Funds, two funds administered by boards of trustees of identical composition, John J. Kenny acted as unsalaried chairman of both boards of trustees in addition to performing his duties as President of Local 237, an elected post for which he received compensation.

²29 U.S.C.A. #1132(e)(1) provides:

" . . . the district courts of the United States shall have exclusive jurisdiction of civil actions under this sub-chapter brought by the Secretary or by a participant, beneficiary, or fiduciary.

Appendix

Pursuant to the declaration of trust,³ on October 21, 1971, the trustees of the Local 237 Trust Funds signed a formal contract of employment which named John J. Kenny as Chairman of the Board of Trustees and Director of the Local 237 Trust Funds. On May 1, 1973, Mr. Kenny accepted the terms of the contract as amended June 14, 1972, agreeing to devote whatever time he felt was necessary in the performance of his duties and accepting compensation of \$18,000.00 per year, subject to a yearly increase of ten percent during the term of the contract or any renewal thereof. The trustees agreed to reimburse Mr. Kenny for expenses incurred in supervising the Funds and in operating the automobile with which he was to be provided.

³The Agreement and Declaration of Trust of the Local 237 Trust Funds, as amended, provided:

Section 5. -- Compensation --

No Trustee shall receive any compensation for the services rendered by him as Trustee. However, in those instances wherein the Trustee is also designated to act in a dual capacity as Director of the Fund, compensation shall be permitted to be paid to said Trustee in the capacity as Director.

Appendix

Under the terms of the contract, Mr. Kenny was not subject to discharge and, upon termination of his employment, was entitled to severance pay in the amount of \$16,500.00. The contract could be renewed at his option for an additional five years under the same terms and conditions.

After May 1, 1973, Mr. Kenny did not receive compensation as President of Local 237 and, on September 7, 1973, he resigned that position.

In September, 1973, William L. Meyers Co., with the approval of the trustees, conducted a study of the administration of the Local 237 Trust Funds and submitted a report, dated October 5, 1973, which contained suggestions for the Funds' improved efficiency. Mr. Meyers found no improprieties in the administration of the Trust Funds.

In March, 1974, Local 237 merged with the Bartenders Local Union 188 to form Local 57 Western Pennsylvania Hotel, Club, Motel and Restaurant Employees and Bartenders Union,

Appendix

and direction and control of the assets of the Local 237 Trust Funds were transferred to the trustees of the Western Pennsylvania Trust Funds. On March 7, 1974, the trustees voted to remove Mr. Kenny from the board of trustees and to hire William L. Meyers Co. as administrator of the Trust Funds. Mr. Kenny continued to receive his salary as Director of the newly-named Trust Funds until August 19, 1974, when the trustees voted to discontinue his salary. During his employment, Mr. Kenny received \$24,600.00 under the terms of the contract and continues to have possession and use of an automobile owned by the Trust Funds.

On April 1, 1975, the Western Pennsylvania Trust Funds were merged with the International Trust Funds. There is no evidence that the transfer of the funds was made for any purpose other than to discharge the fiduciary duty of the trustees to administer the Trust Funds in the interest of the

Appendix

participants and beneficiaries and with the care, skill, prudence, and diligence required by statute.⁴

Although the defendants content that Mr. Kenny was unwilling or unable to perform his duties as Director of the Trust Funds and that he was therefore terminated for just cause, the report of the study conducted by the William L. Meyers Co. does not establish that Mr. Kenny's performance was unsatisfactory. Mr. Meyers further dispelled any such inference by his testimony that the recommended improvements could have been implemented under Mr. Kenny's administration.

The court finds no evidence of support the contention that Mr. Kenny used improper means to secure the contract or that the compensation provided in exchange for his services was not reasonable.

⁴ 29 U.S.C.A. #1104

Appendix

CONCLUSIONS OF LAW

The court has jurisdiction over the per- and subject matter of this action pursuant to 28 U.S.C.A. #1441(a).

The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. #1001 et seq. Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract. The subsequent transfer of the Trust Funds does not cure the breach.

The measure of damages recoverable by an employee for the breach of an employment contract for a specific term is:

". . . the amount of his salary for the unexpired term less any sums which he has earned following his discharge and which he may thereafter earn during the unexpired term of the contract."

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Russell v. Barnes Foundation, 52 F. Supp. 827, 830 (E.D. Pa. 1943), aff'd 143 F.2d 871 (3d Cir.), cert. denied 323 U.S. 771 (1944). citing Pierce v. Tennessee Cola, Iron and Railroad Company, 173 U.S. 1 (1899).

In view of Mr. Kenny's limited formal education (four years of elementary school), his 73 years of age, and the fact that he has sustained two severe heart attacks in recent years, (Tr. 97-100), it is not likely that he would find employment elsewhere. It is therefore concluded that, as to the first five-year period of the contract, Mr. Kenny may recover \$128,290.30, the sum of the following: \$67,468.00, the compensation which he would have received to date, and \$16,500.00, severance pay under the terms of the contract, plus \$44,322.30, compensation for the remaining twenty-one months of the five-year term. Future losses are not reduced to present worth because it is believed that the differential is off-set by non-inclusion of interest on plaintiff's losses to date.

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The above considerations, in addition to those contained in Mr. Kenny's motion for advancement of the trial date,⁵ lead this court to conclude that it is not probably that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term.

The defendants' counterclaim for salary paid under the terms of the contract until May, 1973, will be denied.

An appropriate Order will be entered.

Herbert P. Sorg C.D.J.

Dated: Aug. 2, 1976

⁵The plaintiff's Motion to Advance Trial, granted on January 1, 1976, set forth the following:

7. Plaintiff is 74 years of age, is suffering from hypertension and heart ailment necessitating constant cardiological care and requiring that he avoid stress. Delay in the within trial aggravate his ailments, as counsel for plaintiff is advised by Dr. Julian Levinson, plaintiff's physician.

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN J. KENNY, }
 Plaintiff, }
 v. }
LOUIS SANFILIPPO, et al., }
 Defendants. }

Civil Action
No. 75-40

O R D E R

AND NOW, this 2nd day of Aug., 1976,

IT IS HEREBY ORDERED that judgment be entered in favor of the Plaintiff and against the Defendants in the amount of \$128,290.30, together with costs.

IT IF FURTHER ORDERED that the automobile assigned to John J. Kenny be returned to the International Trust Funds.

C.D.J.
Herbert P. Sorg

cc Harry Alan Sherman, Esq.
1709 Blvd. of the Allies
Pittsburgh, Pa. 15219

Gerald Schilian Esq.
540 Madison Avenue
New York, N. Y. 10022

Appendix

THE PRE-TRIAL STIPULATION ADMITTED FACTS
(Vol II jt. App.p.117a)

Among the stipulations of fact agreed upon are:

"10. The employment contract, and amendments thereto, which are the basis of the plaintiff's complaint, and are attached as Exhibits "A" and "B" thereto, were entered into during the separate existence of Local 237 and the Local 237 welfare and pension trusts."

"20. In the July, 1971 meeting of the trustees of Local 237 Pension and Welfare Trusts, a resolution was adopted offering to plaintiff directorship of both Local 237 trusts under written contract. Plaintiff did not accept the offer, but was granted time to do so."

"21. At the October, 1971 Local 237 trustee m-etings of the pension and welfare trusts a formal contract of employemnt of plaintiff as director of the trusts was presented for signatures of the trustees and was signed by all of the trustees. Plaintiff did not, however, enter into the employment as director at that time. He continued as the present of Local 237 and as chairman of both local 237 trusts."

Appendix

"22. At the June, 1972 meetings of the local 237 trusts, a formal amendment to the July, 1971 contract (Exhibit 2) was presented for adoption and signature of the trustees, all of whom signed same. Plaintiff still did not accept the position as director of the trusts."

"23. Following intervening correspondence with International Union President Ed. S. Miller concerning same, on April 26, 1973 the plaintiff elected to comply with the provisions of the proffered employment contract as amended, accepting the salary provisions thereunder, and simultaneously foregoing any salary as president of Local 237."

"24. Following the merger of Local 237 and Local 188 into Local 57, as of March 1, 1974 and the establishment of the Western Pennsylvania trusts, plaintiff continued receiving his salary as director of the newly named trusts until the end of August, 1974, since which time he has not been paid."

"25. Direction and control of the trust assets of Local 237 pension and welfare trusts were transferred to the trustees of the Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Pension and Welfare Funds in March, 1974."

Appendix

"26. Plaintiff's employment contract as amended was in effect as of the date of transfer referred in to 25."

CONTRACT OF EMPLOYMENT

This agreement made and entered into this 21st day of October, 1971, by and between the undersigned trustees of the Hotel and Restaurant Employees Alliance Local Union Insurance and Welfare Trust Fund and Trustees of the Hotel and Restaurant Employees Alliance Local Union 237 Pension Trust Fund hereinafter referred to as the "Trustees" and John J. Kenny,

WHEREAS, under and by virtue of resolutions by the Trustees, adopted as a result of motions passed on the 13th day of July 1971 at meetings of the Trustees wherein they indicated that the said John J. Kenny may at his option take the job as Chairman of the Board of Trustees and Director of the Funds,

NOW THEREFORE, in consideration of the mutual promises herein contained, and for other good and valuable consideration, the receipt of which is hereby acknowledged, it is herewith and hereby agreed as follows:

1. That John J. Kenny is the Chairman of the Board of Trustees for the term herein stated and is hereby appointed and employed as Director of the Hotel and Restaurant Employees Alliance Local

Contract of Employment

237 Insurance and Welfare Trust Fund and for the Hotel and Restaurant Employees Alliance Local 237 Pension Trust Fund for a period of five (5) years effective with the date of commencement of duties as Director of the Funds. He shall not be subject to discharge or removal for said period of time unless by mutual agreement of the said John J. Kenny and the majority of the Trustees.

2. The said John J. Kenny shall have full authority to direct the administration of the Trust Funds, subject only to the paramount authority of the Trustees as set forth under the terms of the Trust Agreements, to be operated in accordance with past operating practices.

3. That pursuant to the amendments to the Trust Agreements the said John J. Kenny is herewith and hereby authorized to continue to act as Chairman of the Board of Trustees of both Funds as well as Director thereof.

4. As compensation for his services,

Contract of Employment

the said John J. Kenny shall be paid by the Trustees out of the Trust Funds the sum of \$18,000.00 per year payable weekly. Each year thereafter he shall receive a ten (10%) per cent increase during the term of this contract or any renewal thereof. In addition thereto the Director shall be furnished with an automobile and reimbursed all expenses incurred by him in the maintenance and operation of that automobile. He shall also receive and be reimbursed for any and all expenses incurred by him in connection with the operation of the aforesaid funds.

5. The said John J. Kenny herewith and hereby agrees to devote full time and efforts to the performance of his duties as Director of the said Funds and shall have the right to retire at any time within his discretion.

6. Payment for the salary and all expenses for the said John J. Kenny shall be divided equally by and between the two Funds specified as hereinabove.

7. As part of his compensation as Director of the Funds, the said John J. Kenny

Contract of Employment

shall be entitled to severance pay upon termination of employment in accordance with the following terms and conditions:

- (a) The amount of severance pay shall be \$16,500.00.
- (b) The severance pay shall be paid in three equal yearly installments of \$5,500.00, the first installment to be due and payable thirty-one days after the termination of John J. Kenny's employment as Director of the Funds and the second and third installment payments shall be due and payable on the yearly anniversary dates of the first payment.
- (c) In the event that John J. Kenny predecease the receipt of the entire \$16,500.00 and be survived by Rosa Kenny, his wife, then such installment payment or payments shall be paid to Rosa Kenny in the place of John J. Kenny as they become due.
- (d) In the event that both John J. Kenny and Rosa Kenny predecease receipt of

Contract of Employment

all or any of such installment payments, the obligation of the Health and Pension and Welfare Trust Funds to make such installment payments shall cease and terminate in such manner and fashion that in no event shall such installment payments be due to the estate or heirs of either John J. Kenny or Rosa Kenny.

(e) In the event that John J. Kenny should be deceased prior to receipt of any amount of severance pay, payment in the sum of \$16,500.00 should be made to Rosa Kenny in three equal annual installments.

7. Said John J. Kenny shall have the option to renew and extend the terms of this contract for an additional five years subsequent to the termination thereof under the same terms and conditions as hereinabove specified except as may be modified by agreement between the parties.

Contract of Employment

Hotel and Restaurant
Employees Alliance
Local 237 Pension
Trust Fund

/s/ Frank Blandi
/s/ W.B. Settle
/s/ Leo White
/s/ Henry J. Huenrich
/s/ Daniel Dubaniewicz
/s/ Frank E. Prince
/s/ Louis Sanfilippo
/s/ Robert V. Kern
/s/ Aug. Z. Sommers
/s/ Ranald S. Rossa
/s/ Gurdon F. Flagg
/s/

Hotel and Restaurant Employees
Alliance Local
237 Insurance and
Welfare Trust
Fund

/s/ Frank Blandi
/s/ W.B. Settle
/s/ Leo White
/s/ Daniel Dubaniewicz
/s/ Roger E. Jackson
/s/ Frank E. Prince
/s/ Louis Sanfilippo
/s/ Robert V. Kern
/s/ Aug. Z. Sommers
/s/ Ranald S. Rossa
/s/ Gurdon F. Flagg

CONSENTED TO:

John J. Kenny

Contract of Employment

HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LO-
CAL #237 PENSION TRUST FUND

R E S O L U T I O N

AMENDING CONTRACT OF EMPLOYMENT OF
JOHN J. KENNY AS DIRECTOR OF FUNDS

WHEREAS, on the 14th day of June, 1972 at
a duly called, convened and conducted meet-
ing of the Board of Trustees of the Hotel
and Restaurant Employees Alliance Local 237
Pension Trust Fund a motion was made and car-
ried to the effect that the contract of employ-
ment concerning the employment of Mr. John
J. Kenny as Director of the Fund should be
amended, and

WHEREAS, the original contract of em-
ployment contained a provision which set
forth that Mr. Kenny shall devote full time
to his job as Director of the Fund, and

WHEREAS, The Board of Trustees desire to
amend the contract of employment to state
that with respect to the time required to
do the job as Director of the Fund, Mr.
John J. Kenny shall devote whatever time
he feels is necessary to perform his duties

Contract of Employment

as Director, and

NOW THEREFORE, be it resolved that the
contract of employment employing John J.
Kenny as the Director of the Hotel and Res-
taurant Employees Alliance Local #237 Pen-
sion Trust Fund is hereby amended to state
that Mr. John J. Kenny as Director of the
Fund shall devote as much time as he deems
necessary to perform his duties as Direc-
tor of the Fund.

HOTEL and RESTAURANT EMPLOYEES
ALLIANCE LOCAL 237 PENSION
TRUST FUND

/s/ John J. Kenny
/s/ Frank E. Prince
/s/ Leo White
/s/ Daniel Dubaniewicz
/S/ Renald Rossa
/s/ Robert V. Kern
/s/ Louis Sanfilippo
/s/ Umberto Guidotti

NOV 3 1977

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. **77-445**

JOHN KENNY and ROBERT KENNY, Executors of the Estate
of JOHN J. KENNY, Decd.,

Petitioners,

vs.

LOUIS SANFILIPPO, et al.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.**

ROBERT MOZER

Counsel for Respondents

One Penn Plaza
New York, New York 10001
(212) 695-3252

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771 (1944) 3

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In The
Supreme Court of the United States

October Term, 1977

No.

JOHN KENNY and ROBERT KENNY, Executors of the Estate
of JOHN J. KENNY, Decd.,

Petitioners,

vs.

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN
HOWARD, UMBERTO GUIDOTTI, ARTHUR
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.
SETTLE, LEO WHITE, DANIEL DUBANIEWICZ,
ADOLPH DONADEO, H.J. GUERICH and FRANCIS
KEENAN, All as Trustees ad litem of the WESTERN
PENNSYLVANIA HOTEL, CLUB, MOTEL, AND
RESTAURANT EMPLOYEES PENSION FUND, and/or
SUCCESSOR TO TRUSTEES OF THE HOTEL AND
RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION
237 INSURANCE AND WELFARE TRUST FUND AND
TRUSTEES OF THE HOTEL AND RESTAURANT
EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION
TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,
RENALD ROSSA, JOSEPH CICARDINI, NORMAN

HOWARD, UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B. SETTLE, LEO WHITE, DANIEL DUBANIEWICS, NICHOLAS ALWINE, H.J. HUENRICH and FRANCES KEENAN, all as Trustees ad litem of THE WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL and RESTAURANT EMPLOYEES WELFARE FUND, and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND AND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES, ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION WELFARE FUND and WILLIAM L. MEYERS, Individually and trading as WILLIAM L. MEYERS COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARGUMENT

The District Court's finding of fact does not raise a question for review by the Supreme Court.

This case arose out of the termination of John Kenny's employment by respondents. Kenny sued, claiming the termination was a breach of his contract. Respondents counterclaimed for monies already paid Kenny and raised various defenses to the contract including lack of consideration

and breach of fiduciary duty by Kenny. The District Court found for petitioner and the Court of Appeals affirmed.

Petitioner comes before this Court challenging the amount of damages awarded below. He acknowledges that the District Court cited the appropriate rule of law in measuring damages, but challenges its factual application (Petition p. 19).

The contract itself was for a period of five years (Petition p. 49). Petitioner had the option to renew for a second five years (Petition p. 52). In determining the damages, the District Court awarded Kenny the amount of his salary for the five-year term of the contract (Petition p. 41-42).

The District Court then concluded that Kenny, due to his age and medical condition, would not have exercised the option to renew (Petition p. 42-43). The District Court specifically referred to Kenny's own motion to advance trial wherein Kenny stated that he was 74 years of age and "suffering from hypertension and heart ailment necessitating constant cardiological care and requiring that he avoid stress" (Petition p. 43).

The District Court relied on *Russell v. Barnes Foundation* 52 F. Supp. 827 (E.D. Pa. 1943), *affd*, 143 F.2d 871 (3d Cir. 1943), *cert. denied*, 323 U.S. 771 (1944), and *Pierce v. Tennessee Coal, Iron and Railroad Company*, 173 U.S. 1 (1899) for its conclusion that for the 5 year specific term of the contract Kenny was entitled to his salary less any potential earnings (Petition p. 41-42). By doing this, Kenny "would simply recover the value of the contract to him at the time of the breach" *Pierce, supra*, at 16.

The District Court then went on to conclude that, as a question of fact, "it is not probable that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term" (Petition p. 43). The factual findings of the District

Court on this question should be upheld unless "clearly erroneous" Rule 52, Federal Civil Rules. Here, as noted, there was ample support in the record for the Court's conclusion that a man in his mid-seventies, having already suffered two severe heart attacks and requiring constant medical care for hypertension and a heart ailment, would not exercise his option to work an additional five years.

In any event, whether the District Court's finding of fact is correct is of interest only to the parties in this proceeding. It raises no issue of federal law nor does it conflict with established principles of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Robert Mozer
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